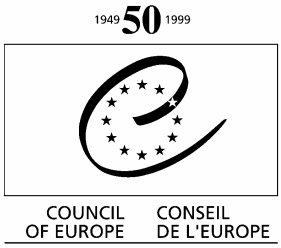

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW

ON THE ORGANISATION AND THE FUNCTIONING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA

Comments by:

Mr Luis LOPEZ GUERRA
(Spain)

General Introductory Comments

In an initial assessment, the present draft law presents two main features:

1. It is a relatively short legal text, at least in comparison with the 107 generally very long articles of the German law on the Federal Constitutional Court, or the 109 articles and additional clauses of the Spanish law on the same subject. The brevity of the law is the result of two techniques: on the one hand, by not including provisions on the Constitutional Court already included in the Constitution of the Republic of Albania (CRA) (arts. 125 to 134, 145.2); and, on the other, by a remission to the "general procedural rules" (art. 1.2 of the law) in matters concerning the conduct of the proceedings. The use of these techniques implies that, in order to ascertain the regulation of the structure and functioning of the Court, it is necessary to consult the law, the Constitution, and the "general procedural rules", with the usual problems of integration and coherence derived from the use of different legal texts. An initial and very general recommendation would be to include in the law those constitutional clauses referring to the Constitutional Court, in order to deal in a systematic and complete way with the different aspects of the Court.

2. The draft, concerning procedural matters, prefers to deal with those aspects common to all proceedings before the Constitutional Court, instead of dealing with those proceedings one by one (as it is the case with the German and Spanish laws cited above). This choice could give rise to problems, as the specific nature of each of these proceedings would seem to require more detailed regulation.

Chapter I. General Provisions

Art. 3.1.

Suggested addition:

1. "The Constitutional Court obeys only to the Constitution and shall perform, its functions according to the provisions of the present law".

Reason: coherence with following paragraph, art. 9.2, which refers to the "obligations set by the Constitution and this law".

Art. 3.4.

Present wording:

"None has the right to give opinions or make public declarations for cases under examination by the Constitutional Court before a decision is being taken".

Suggestion: delete completely.

Reason: This article contravenes the freedom of expression, guaranteed in art. 22 of the Albanian Constitution. Furthermore, it must be assumed that the Judges of the Court would be sufficiently independent and professional enough so as not to be influenced by comments or press critiques.

Art. 6

Suggested addition:

The Constitutional Court executes (or administers) its own budget.

Reason: only the drafting of the budget is included in the actual version.

Chapter II. Organization of the Constitutional Court

General Comments:

Some of the articles of the Constitution (art. 125, 127 to 129) deal with the organization of the Court. It would be advisable to include the content of those articles in this chapter, in order to produce a general comprehensive regulation.

Some matters require a more detailed treatment. For instance, art. 125 of the Constitution States that "one third of the composition of the Constitutional Court is renewed every 3 years, according to the procedure determined by law". The draft law (art. 7.2) however, does not deal with that matter, remitting (once again) to the Constitution: " The chairman and the members of the Constitutional Court are nominated according to the provision of the Article 125 of the Constitution of the R.A."

Art. 7.2

Suggested addition:

a) Regulate in some detail the provisions of art. 125.3 of the Constitution.
b) Introduce provisions concerning the categories of jurists deemed eligible to become judges of the Court.

Reason:

As for a), see the previous General Comments.

As for b), article 7.2 remits to art. 125 of the Constitution concerning the nomination of judges of the Constitutional Court. However, there is a point which is hardly dealt with in the Constitution: the prerequisites to become a judge of the Court. The Constitution only refers to "lawyers" (in the English version) and the meaning of the term

should be explained, for instance, by enumerating those legal professions eligible to qualify for a judgeship on the Court, such as trial lawyers, civil servants, University professors, practising judges, and so on. Experience shows that this point could become a matter of contention.

Also, if civil servants, practising judges, or University professors are eligible to become judges of the Constitutional Court, it would be advisable to regulate whether they would have the right to return to those posts when they finish their mandates as judges of the Court.

Art. 8.4

Suggested change:

The judge of the Constitutional Court continues his mandate until his successor has taken the oath of office.

Reason: the proposed formula varies from the one included in the Constitution (art. 125) but takes into account the possibility of a vacant period between the appointment and the oath. It seems advisable to avoid such a vacancy.

Art. 10

Suggested change (second clause)

The chairman shall designate, among the members of the Court, a deputy chairman which will deal with the duties appointed by the chairman, and will substitute him in case of absence.

Reason: It seems advisable to have a permanent substitute for the chairman. A Vice chairman also assists with and facilitates protocol and ceremonial tasks.

Chapter III. Status of the members of the Constitutional Court

General Comments:

Art. 126 of the Constitution sets forth the main features of the status of the judges of the Court. In line with previous comments, it would be useful to include the provisions of that article in the law on the Constitutional Court.

The immunity clause of art. 126 of the Constitution represents an exception to the general equality clause of art. 18, and, thus, must be interpreted in a restrictive way.

Therefore, a provision requiring the Court to justify (reason) its decision when denying its consent to the eventual criminal prosecution of one of its members should be included.

Art. 14.3

Suggestion: It would be advisable to amend this paragraph, establishing that the initiation and substantiation by the Public Prosecutor of a criminal suit against a member of the Court must imply the provisional separation of the judge from the Court.

Reason: Given the role of the Public Prosecutor, "subject to the Constitution and the laws" (art. 148.3 of the Constitution) it seems that his accusation of a member of the Court is reason enough to, provisionally, suspend the indicated member, in order to maintain the credibility and public prestige of the Court. Furthermore, according to art. 126 of the Constitution, "a judge of the Constitutional Court cannot be criminally prosecuted without the consent of the Constitutional Court". If the Court agrees to allow the prosecution (thus admitting that the prosecution is prima facie, well-founded) it seems logical to suspend the prosecuted judge from his functions as a precautionary measure.

Chapter IV. Principles of the Constitutional Process

Art. 21

Suggestion: The article should be amended, in order to make defense by a lawyer mandatory in constitutional proceedings. The complexity and relevance of the matters and interests at stake imply that a party without the benefit of professional counsel would be in a disadvantaged position seriously affecting his legal defense. Parties without economic means should be assisted by a public defender.

Art. 23.1

Suggested addition to 23.1: The decisions on the violations of individual rights will come into force with their notification to the parties.

Comment: The second clause of art. 23.1 presents some problems. It seems reasonable that the decisions of the Court having general effects (for instance, concerning unconstitutionality of laws) enter into force with their publication in the Fletorja Zyrtare. But, concerning decisions with individual effects (such as those dealing with violations of individual rights) the delay between the signing of the decision and its publication could be very detrimental to the affected persons.

Chapter V. Presentation and Preliminary Examination of Request

General Comments:

As stated in the General Introductory Comments, the draft law chooses to regulate the common characteristics of all of the proceedings before the Court. However, the diversity of proceedings would make the individual regulation of the principles of each one of them useful (if not necessary).

At least two points seem to vary considerably in those proceedings:

a) Standing to commence proceedings.
b) Deadlines for their commencement.

Art. 131 and 134 of the Constitution must be integrated in this law, stating which of the subjects listed in art. 134 CRA have standing to initiate each of the proceedings enumerated in art. 131 CRA.

Also, a more precise regulation of the proceeding included in art. 145.2 CRA (question of unconstitutionality) should be introduced, defining the extent of the intervention of the parties in the proceeding a quo, when the question may be raised, and so on.

Art. 26

Suggested addition:

A new paragraph stating that the interested persons cited in the request shall receive from the Court a copy of the brief of complaint.

Reason: An indispensable requisite for preparing the defense of one's own legal position is to know the content and the reasons of the complaint of the other parties in a legal action. In order to prepare the participation of all parties in the plenary sessions regulated in Article 40 of the law, a previous knowledge of the request is necessary. Therefore, it seems that an specific provision with the above mentioned wording should be added.

Art. 27

Comments: A more detailed regulation of the deadlines for submitting requests before the Court seems advisable, since there are many types of proceedings, each requiring an adequate formula.

- Concerning proceedings to determine the unconstitutionality of a law (art. 131 a) CRA), of normative acts of local or central organs (art. 131 c) CRA) and conflicts of

competencies (art. 131 d) CRA), a deadline should be introduced in order to avoid a permanent lack of legal certainty, so that, after a deadline, normative acts would be considered as final.

- Concerning the compatibility of international agreements with the Constitution, prior to their ratification, no deadline other than the ratification itself is needed; but it would be necessary to introduce a deadline for eventual requests against international treaties after their ratification.

- Some provision should be introduced concerning decisions on the constitutionality of referenda, establishing a (short) deadline for requests in that regard.

- Concerning requests involving violations of constitutional rights, a deadline of six months would be excessive, since it would result in a lack of legal certainty. Furthermore, the date of commencement should be the day in which the citizen is notified of the decision of the state organ (favoring legal certainty, and being more just than the day of the decision).

Art. 28.3

Suggested change: instead of "and the request is regarded not to be of the competency of the Constitutional Court", the formula "or the request..." would give more discretion to the Court to "filter" requests.

Chapter VI. Functioning of the Constitutional Court

Art. 40

Suggested addition:

It would be advisable to include a paragraph stating the right of the parties to submit a written document stating in length their position in the case.

Reason:

Oral argument and verbal explanation might not be enough to deal sufficiently with the complexities of constitutional questions. Furthermore, if the plaintiff (or author of the request) has the possibility of submitting a written (and presumably extense) document stating his position, it seems only fair that the other parties receive similar treatment.

Art. 52

Comment. The questions raised by this article derive from the unclear meaning of two words (in the English version): "interpretations" and "retroactive". Generally, the problem (shared by all Constitutional Courts) is to determine the effects of a decision of the Court (either declaring unconstitutional a law, or offering a new interpretation of an article of the Constitution) on previous judicial decisions, rendered before the Constitutional proceedings were initiated applying, (perhaps many years earlier), laws now declared unconstitutional, or a different interpretation of the Constitution.

Does art. 52 of the law mean that all previous judicial rulings, not matter how old, can be reopened and revised, to apply the new doctrine of the Court? If so, it would be convenient to specify this point. If not, it would be also advisable to state, with some precision, that all (or some) previous judicial decisions will not be revisable. An intermediate solution could be to maintain the effects of old rulings (in order to preserve legal certainty and confidence in the decisions of the Courts) with the exception of those affecting the freedom of citizens (criminal sentences), because of the importance of the rights concerned. In any case, a reference to the meaning of "retroactive effects" should be made.

September 17th 1999

Luis LOPEZ GUERRA